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No. 44, 19, and 70

In the Supreme Court of the United States

OCTOBER TERM, 1957.

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MITSUGI NISHIKAWA, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT L. TROP, PETITIONER

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE OF THE UNITED STATES, AND UNITED STATES DEPARTMENT OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 44

CLEMENTE MARTINEZ PEREZ, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19

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JOHN FOSTER DULLES, AS SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS ON REARGUMENT

This supplemental brief on reargument will be devoted to (*a*) clarification of certain arguments made

in our initial briefs and at the original oral hearings, (*b*) presentation of some materials and arguments not included in our initial briefs; and (*c*) a response to certain of the contentions made by the petitioners last term or on the reargument.

I. FURTHER COMMENTS ON THE GENERAL POWER OF CONGRESS TO DESIGNATE WHAT CONDUCT SHALL EFFECT LOSS OF AMERICAN NATIONALITY

In our original brief in *Perez* (at pp. 13–37), we discussed at some length the general power of Congress to establish standards for loss of American nationality and to designate what voluntary conduct shall effect loss of citizenship even though the citizen does not desire or intend to lose his American nationality. In this supplemental brief, we would add the following:

A. POWERS INHERENT IN THE UNITED STATES AS A SOVEREIGN NATION

1. Our primary position is that, as this Court held in *Mackenzie* v. *Hare*, 239 U. S. 299, 311, the power of Congress over denationalization exists even though it is not spelled out in Article I, Section 8, of the Constitution. There are many examples of such powers inherent in national sovereignty, though unexpressed in the Constitution, which this country possesses, as a member of the family of nations, together with the other states of the world. See, *e. g.*, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318. The Necessary and Proper Clause recognizes the existence of such authority when it provides that Congress shall have the power not only to make all laws necessary and

proper for carrying into execution "the foregoing Powers", *i. e.*, those granted by Article I, Section 8, but also the authority to make all laws necessary and proper for carrying into execution "*all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (emphasis added).

Among the "other Powers vested by this Constitution in the Government of the United States" are those which are "inherently inseparable from the conception of nationality" (*United States* v. *Curtiss-Wright Corp., supra*), or are "necessary to maintain an effective control of international relations" (*Burnet* v. *Brooks*, 288 U. S. 378, 396). That the general power to enact loss-of-nationality legislation falls into these categories, fundamental to the authority of all sovereign nations, is shown by the simple fact that almost every nation has adopted various provisions of this kind. See Laws Concerning Nationality (U. N. Leg. Ser. 1954). And if Congress, alone among the legislative bodies of the world, has no such general power, then it could not even provide for the expatriation of Americans who voluntarily assumed the nationality of another country or took a foreign oath of allegiance, at least where the citizen desired to retain his United States nationality. But cf. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491. The petitioners in *Perez*, No. 44, and *Trop*, No. 70, explicitly recognize that that cannot be the law. See our original brief in *Perez*, pp. 13–15.

2. This general power over expatriation undoubtedly has its limits. No specific constitutional provi-

sion or prohibition governs, but the Due Process Clause of the Fifth Amendment would condemn any arbitrary or unreasonable use of the power. As stated in our initial brief in *Perez*, pp. 34-35, we suggest that it would be arbitrary and unreasonable to attach the severe consequence of denationalization to conduct which is not closely related to the cardinal elements of nationality and allegiance. But the primary responsibility is Congress's, and the choice is for it to make. The overseeing power of the courts lies within narrow confines.

In each instance, the courts must consider and weigh a multitude of factors before the legislation can be invalidated: (*a*) the general relationship of the statute to our dealings with other countries; (*b*) the possibility of international embarrassments, controversies, or conflicts of allegiance; (*c*) the citizen's showing of preference, by performing the designated act, for another country over this one, or of lack of attachment to this country; (*d*) the citizen's repudiation, by performing the designated act, of his total obligations as a citizen of this country, or of the highest demands of citizenship; (*e*) the history and general acceptance of the particular legislation; (*f*) the factual showing, and the other considerations, on which Congress acted; (*g*) the practice of other nations with comparable ideals and systems of government.

In our main briefs in *Perez* and *Trop*, we have discussed, in terms of the foregoing factors, the four denationalization provisions involved in these cases. There is additional discussion in Point III, *infra*, pp.

11 *ff.* On the basis of this discussion, we submit that none of these four provisions can be characterized as an arbitrary or capricious exercise of the powers over nationality inherent in the United States as a sovereign nation.

B. POWERS EXPRESSLY GRANTED BY THE CONSTITUTION

Even if we are wrong, and Congressional power over denationalization must be found in, implied from, or appurtenant to, a power expressly granted to Congress by the Constitution, there is adequate warrant for each of the four statutory provisions at stake in these cases. We believe that they are supported by the war power, the powers to raise and support armies and to make rules for the government of the forces, and the power of Congress to regulate our relations and intercourse with foreign nations—taken together with the Necessary and Proper Clause.

1. *Section 401 (e)—service by a dual-national in the forces of his other state.*[1] Under its express power to regulate foreign affairs, Congress has, for almost 140 years, prohibited the acceptance within the United States of a commission in a foreign army at war with a nation with which this country is at peace, or the enlistment within the United States in any foreign army. Act of April 20, 1818, secs. 1 and 2, 3 Stat. 447, 448; Rev. Stat. 5281–5282; now 18 U. S. C. 958, 959. The same constitutional power would obviously sustain a criminal prohibition against the voluntary entry, outside the United States, of an American dual-national into the forces of his other state. Similarly,

[1] Involved in the *Nishikawa* case, No. 19.

we submit that it is a "necessary and proper" incident to its power over foreign affairs for Congress to provide, not criminal punishment, but loss-of-nationality for such a dual-national—in order (*a*) to avoid conflict with the state of the other nationality over the military service of the dual-national, (*b*) to avoid conflict with third countries against whom the dual-national may have to fight, and (*c*) to avoid having a dual-national, like Nishikawa, fight against this country. See also our main *Perez* brief, pp. 38–39.

2. *Section 401 (c)—voting in a foreign political election.*[2] This provision, too, falls within the ambit of Congress's power to regulate intercourse with foreign countries. To avoid international conflicts and to preserve the integrity of American political processes and the singleness of American allegiance, Congress, could, under its granted powers, prohibit voting abroad by Americans. By the same token, it is a "necessary and proper" incident of the granted power to achieve those results by severing the cord of allegiance between the United States and the American who voluntarily votes abroad. See also our main *Perez* brief, pp. 39–40.

3. *Section 401 (j)—remaining abroad to evade military service.*[3] This subsection is sustained by the war power, the power to raise armies, and also the foreign affairs power. The relationship to the draft and to the power to wage war are manifest; the foreign affairs power is invoked by the potential conflicts incident to

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[2] Involved in the *Perez* case, No. 44.

[3] Involved in the *Perez* case, No. 44, and the *Mendoza-Martinez* case, No. 54, this Term, pending on petition for a writ of certiorari.

the draft-evader's taking refuge in a foreign country and thus seeking its asylum and protection against our Selective Service System. See also our main *Perez* brief, pp. 40–49, and Point III, *infra*, pp. 11 *ff.*

4. *Section 401 (g)—deserting the armed forces in wartime.*[4] Subsection (g) finds its constitutional warrant in the express powers to wage war, to raise armies, and to regulate the government of the armed forces. Desertion is a very grave injury to the effective waging of any war, as well as to the maintenance intact of the armed force which is being raised; and the Articles of War have always prohibited desertion, as part of the "Rules for the Government and Regulation of the land and naval Forces". The substantive power to deal with desertion in "necessary and proper" fashion clearly exists. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 155. The propriety of imposing denationalization for wartime desertion is discussed in detail in our main *Perez* brief, at pp. 49–50, our main *Trop* brief, and Point III, *infra*, pp. 11 *ff.*

II. MITIGATION AND AMELIORATION OF THE CONSEQUENCES OF EXPATRIATION

1. It is appropriate to point out explicitly, in discussing the general validity of expatriation legislation, that Congress has always been aware that some of its enactments in this area may lead to harsh results, and has therefore provided for various types of mitigation and amelioration.

For example, after World War I, Congress passed special short-form naturalization statutes "to assist men to regain their American citizenship after they

[4] Involved in the *Trop* case, No. 70.

had expatriated themselves by taking a foreign oath of allegiance required to permit them to enlist in the armies of certain foreign nations." See *Savorgnan v. United States*, 338 U. S. 491, 501 (fn. 17); 40 Stat. 340, 542.[5] Similarly, after World War II, Congress enacted such special naturalization provisions for men who had served in *non-enemy* armies during World War II, and thus may have lost their nationality under Section 401 (c) of the 1940 Act, or, under Section 401 (b), by taking a foreign oath of allegiance. See Section 327 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 248, 8 U. S. C. 1438.

For those who lost their citizenship through voting in foreign political elections, Congress, in the years after World War II, also offered the relief of short-form naturalization. See the Act of August 7, 1946, 60 Stat. 865 (applicable to voting, before that date, in elections in non-enemy states);[6] Act of August 16, 1951, 65 Stat. 191 (extending the same privilege to those voting in Italian elections in 1946 and 1948); Act of July 20, 1954, 68 Stat. 495 (the same for those voting in occupied Japan).

With respect to loss of nationality for desertion and draft-evasion, the Act of March 3, 1865, 13 Stat. 487 (discussed in our main *Perez* brief, pp. 41 *ff*, the *Trop* brief, and *infra*, pp. 11 *ff*) contained the "built-in" relief provision that it did not apply to those who re-

[5] Taking a foreign oath of allegiance was an act of expatriation under Section 2 of the Citizenship Act of 1907, 34 Stat. 1228.

[6] In No. 44, petitioner Perez, who had voted in Mexico in 1946, could have taken advantage of this ameliorating statute, but did not do so within the year prescribed by the Act.

turned within 60 days after a Presidential proclamation required by the Act to be issued. In 1912, the 1865 Act was modified to make it inapplicable to peacetime desertions (Act of August 22, 1912, 37 Stat. 356), and it was also expressly provided "That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests * * *."[7] In similar fashion, Section 401 (g) of the 1940 Act, relating to wartime desertion, was deliberately amended, during World War II, not to apply to servicemen convicted of desertion but who had served their sentences and been restored to duty. See our main *Trop* brief, p. 9, and *infra*, pp. 17, 49.

American women who, like Mrs. Mackenzie of *Mackenzie* v. *Hare*, 239 U. S. 299, lost their nationality by marrying a foreigner, between 1907 and 1922, have also been granted the comparable relief of easy, short-form naturalization (at first, after the dissolution of the marriage, and later even during the existence of the marriage). See Section 3 of the Citizenship Act of 1907, 34 Stat. 1228; Section 324 of the

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[7] This provision was described on the floor of the House by Congressman Roberts, the author of the 1912 amendment, as a "further provision in the bill so that the President, upon application, *could restore citizenship* in these cases where it had been forfeited prior to the passage of the act and thus restore these young men to their rights as American citizens" (48 Cong. Rec. 2904, emphasis added).

For the revealing legislative history of the 1912 Act, see *infra*, pp. 15–17.

Immigration and Nationality Act of 1952, 66 Stat. 246, 8 U. S. C. 1435.

2. At least with respect to the statutory provisions hinging loss of nationality on conviction of a crime (e. g., Section 401 (g) (desertion) and (h) (treason) of the 1940 Act), a Presidential pardon for the offense would also seem to restore nationality. In "blotting" out the offense and removing all "disabilities",* the pardon obliterates the necessary foundation for the loss-of-citizenship. By a proclamation of March 5, 1924, 43 Stat. 1940, President Coolidge pardoned all World War I deserters whose offense was committed after the Armistice and before the formal ending of the war, and thus restored all rights, including nationality, which had been lost under the desertion provisions of the 1865 Act. See the letter of Secretary of War Stimson, dated March 6, 1943, proposing the present version of Section 401 (g) of the 1940 Act (S. Rep. No. 382, 78th Cong., 1st Sess.): "Citizenship may be restored by Presidential pardon, granted in each individual case, or by proclamation as was done by the amnesty and pardon proclamation of President Coolidge of March 5, 1924, restoring the citizenship of those soldiers convicted of desertion after the armistice of November 11, 1918, but prior to the formal end of the war on July 2, 1921." See

* See *Ex parte Garland*, 4 Wall. 333, 380–1; *United States* v. *Klein*, 13 Wall. 128; *Carlisle* v. *United States*, 16 Wall. 147, 151; *Osborn* v. *United States*, 91 U. S. 474, 478; *Knote* v. *United States*, 95 U. S. 149, 153.

also the pardon provision of the 1912 Act, *supra*, p. 9, and footnote 7.[9]

III. ADDITIONAL COMMENTS ON THE PROVISIONS FOR LOSS OF NATIONALITY FOR REMAINING ABROAD TO EVADE THE DRAFT (SECTION 401 (J)) AND FOR DESERTION IN WARTIME (SECTION 401 (G))

A. As pointed out in our original *Perez* brief, at pp. 41, *et seq.*, both Section 401 (j) (draft-evasion) and Section 401 (g) (desertion) of the 1940 Act stem from Section 21 of the Act of March 3, 1865, 13 Stat. 490, providing for forfeiture of the rights of citizenship of deserters and enrolled draftees who departed from their districts or from the United States with intent to avoid military service—with mitigating provisions for those who returned before a certain date. These provisions of the 1940 Act therefore now have almost a hundred years of history—and general acceptance—behind them.

As shown in the *Perez* brief, pp. 42–43, the 1865 statute has been considered a provision for loss-of-

[9] In discussing the Expatriation Act of 1954, 68 Stat. 1146 (which is not involved in any of the present cases), Representatives Keating and Robsion stated that a Presidential pardon could not restore nationality, and that the expatriated individual's status could never be changed except by Act of Congress. 100 Cong. Rec. 11279, 11280, 11281. At least insofar as the denationalization follows upon conviction of a crime, we do not agree with this view; a full pardon would appear to restore the *status quo ante* the crime and thus to restore nationality. As the text shows, President Coolidge was apparently of the same view. And, in any event, Congress could clearly provide that a Presidential pardon should have the effect of restoring nationality. It did so in 1912 (see *supra*, p. 9); and in 1944 it amended Section 401 (g) of the 1940 Act to provide for restoration of nationality if the deserter was reinstated in the armed forces (see *infra*, pp. 17, 19).

citizenship and not merely one depriving the draft-evader or deserter of political rights. Additional evidence of this historical fact is furnished by Secretary of State Hamilton Fish's answer, in 1873, to queries on the subject of expatriation directed by President Grant to all his Cabinet officers. In discussing the general question, Secretary Fish wrote (*Foreign relations*, 1873, Part 2, p. 1187):[10]

> * * * and it will be remembered that Congress has asserted its right to *denationalize its own citizens*, and has defined one mode whereby the right of citizenship shall be forfeited, in the act of March 3, 1865, (13 Stat., p. 490.) which provides that, in addition to the other lawful penalties of desertion from the military or naval service of the United States, all persons who shall desert such service, or who, being enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States with intent to avoid any draft into the military or naval service, duly ordered, *shall be deemed to have voluntarily relinquished and forfeited their rights of citizenship, or to become citizens*, and shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof." [Emphasis added.][11]

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[10] This was less than a decade after the passage of the 1865 Act.

[11] Note that Congress took pains to prescribe that the draft-evaders and deserters "shall be deemed to have voluntarily relinquished and forfeited" their rights. These are terms appropriate to loss of nationality and loss of citizenship as such, rather than merely to the political rights appurtenant to citizenship: in the

Several of the 19th century cases which applied this provision of the 1865 Act, in the context of the right to vote, also characterize the statute broadly as relating to citizenship itself. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 156, 157, 158, 159, 160 ("absolute forfeiture of citizenship," "forfeiture of citizenship", "deprive this class of persons of citizenship," "plaintiff's citizenship has been forfeited"); *Severance* v. *Healey*, 50 N. H. 448, 451 ("deprive any person of citizenship", per Jeremiah Smith, J.); *McCafferty* v. *Guyer*, 59 Pa. 109, 110 ("lost his citizenship under the Act of Congress of March 3d, 1865", per Strong, J.); *Huber* v. *Reily*, 53 Pa. 112, 114, 115, 116, 118 ("forfeiture of citizenship" (several times), "deprivation of his citizenship of the United States", per Strong, J.).[12] See also the letter of Secretary of War Stimson, dated March 6, 1943, recommending the provision which is now Section 401 (d) of the 1940 Act, and referring to the prior law (the 1865 Act, as amended), as dealing with loss of "citizenship" which can be restored. See S. Rep. No. 382, 78th Cong., 1st Sess., *supra*, p. 10.

B. The legislative history of the 1865 Act does not cast much light, one way or the other, on its precise meaning, but the history of the 1912 amendment (restricting its application to peacetime desertion) is

latter case, terms of voluntary relinquishment or forfeiture are not normally used but only an outright prohibition or prescription.

[12] Mr. Justice Strong, later a member of this Court, took pains in his *Huber* opinion to point out that Congress could not legislate with respect to voting in the states.

clear that the Congress then recognized the provision as one for full loss of nationality.

1. The pertinent 1865 provision—Section 21 of the Act of March 3, 1865, 13 Stat. 487, 490, ch. 79—actually formed a part of an omnibus military measure, passed in the very closing days of the Second Session of the Thirty-Eighth Congress, which was entitled "An Act to amend the several Acts heretofore passed to provide for the Enrolling and Calling out the National Forces, and for other Purposes." But the recorded history of that particular measure hardly mentions this provision.[13] It is clear that Section 21 was taken, at the end of the session, from comparable portions of other military bills which had earlier passed the Senate and the House (in differing forms) but had not been enacted into law, and the section was then incorporated, with little discussion, in the omnibus bill together with other unrelated provisions which Congress desired to make law. The true history of the provision, such as it is, is found in the debates on those earlier unsuccessful bills—S. 408 (passed by the Senate only) and H. R. 678 (passed by the House only), of the 38th Congress, 2d session.[14]

The debates on the parts of those bills concerned with the loss of the rights of citizenship for desertion

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[13] The Act of March 3, 1865, was H. Jt. Res. No. 170; see Cong. Globe, 38th Cong., 2d Sess., pp. 907, 915, 927, 1005, 1294–5, 1332, 1335, 1358, 1361, 1378, 1380, 1386, 1398, 1404, 1412, 1413.

[14] For the history of H. R. 678, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 280, 298, 338, 974–980, 1034–5, 1074, 1114, 1154–5, 1160–1, 1169.

For the history of S. 408, as a whole, see Cong. Globe, 38th Cong., 2d Sess., pp. 489, 572–3, 604–616, 609, 631–643.

and draft-evasion certainly stress the loss of the right to vote—disenfranchisement—and the inability to hold office as the primary consequences of the measure. See Cong. Globe, 38th Cong., 2d Sess., pp. 642–3, 1155; also p. 1378 (on the later provision in the omnibus bill). Such emphasis is quite understandable since, in 1865, that *was* the major consequence of the loss of citizenship: the country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens' deportation: the great difference between citizens and aliens was in the right to vote and to hold office. Nevertheless, Senator Hendricks, in opposing the provision did characterize it in these general terms which unmistakably refer to citizenship as such: "I submit to Senators that *it is a horrible thing to deprive a man of his citizenship, of that which is his pride and honor*, from the mere fact that he has been unable to report upon the day specified after being notified that he has been drafted." (Cong. Globe, 38th Cong., 2d Sess., p. 643 (emphasis added).

2. The reports and the debate on the 1912 Act modifying the 1865 statute to apply only to peacetime desertions (Act of August 22, 1912, 37 Stat. 356) [15] are perfectly plain that Congress then viewed the 1865 statute as imposing loss of citizenship in the fullest sense, and that Congress wished to continue that provision only for wartime desertions.

The House Report (H. Rep. No. 335, 62d Cong., 2d Sess., p. 2) dwells on the great severity of the 1865

[15] H. R. 17483, 62d Cong., 2d Sess.; H. Rep. No. 335; S. Rep. No. 910; 48 Cong. Rec. 2903–5, 9542, 11131.

Act as applied to peacetime desertions, and declares that the effect of the 1865 Act

> has been, and will continue to be, so long as it remains on the statute book, *to make outlaws of thousands of American citizens* who, as boys or young men, from homesickness, dissatisfaction with military life, or without consideration of the *fearful penalty* imposed, desert from the Army or Navy.
>
> There are in the United States today *thousands of men who are literally men without a country* and their numbers will be constantly added to until the drastic civil-war measure which adds this heavy penalty to an already severe punishment imposed by military law, is repealed.[16] [Emphasis added.].

On the floor of the House, Representative Roberts, the author of the bill, emphasized the extreme harshness of the 1865 Act with respect to peacetime deserters, and repeated that "we have in this country today thousands upon thousands of young men of American birth who are literally men without a country"; he used the phrases "loss of citizenship", "now robbed of citizenship", and "loss of rights of citizenship" interchangeably. 48 Cong. Rec. 2903–4. See, also his reference to restoration of citizenship in the quotation set forth in footnote 7, *supra*, p. 9.[17] There is no doubt

[16] This House Report also quotes from reports and communications of the Secretary of the Navy clearly revealing that he interpreted the 1865 Act as depriving deserters of citizenship.

The Senate Report (S. Rep. No. 910, 62d Cong., 2d Sess.) is not as explicit as the House Report, but it reveals the same understanding of the 1865 Act.

[17] The Senate debate (48 Cong. Rec. 9542) was perfunctory, dwelling on a minor Senate amendment as to reenlistments.

that the 1912 Congress—and prior Congresses in which similar ameliorative bills had been considered—understood the 1865 statute to provide for denationalization for desertion, just as does Section 401 (g) of the 1940 Act.

C. As pointed out in our main *Trop* brief, pp. 6–9, there are several reasons why we do not think it possible to read Section 401 (g) of the 1940 Act as relating only to desertion *to the enemy*.

1. The subsection simply says "[d]eserting the military or naval forces of the United States in time of war", and it specifically refers to conviction "by court martial"; in military law the offense of desertion has never required desertion to the enemy.

2. The provision in Section 401 (g) for restoration of citizenship upon further wartime service would have little significance if the only desertion covered by the subsection were desertion to the enemy. A deserter to the enemy is very unlikely to return to our forces or, if he did, to be restored to duty; such cases of restoration would be far too rare to be of any concern to Congress (and, as shown *infra*, Congress was not in fact concerned with deserters-to-the-enemy when it enacted the restoration proviso in 1944). Moreover, a deserter to the enemy would in all probability be guilty of treason and thus covered by Section 401 (b) of the 1940 Act; subsection (g) would be superfluous and unnecessary if petitioner Trop were right in his construction.[18]

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[18] Winthrop, *Military Law and Precedents*, 2d ed., p. 645, points out that "[d]esertion to the enemy is almost invariably punished with death", another circumstance which would render Section 401 (g) superfluous if petitioner were correct.

3. Like the treason provision (subsection (h)), and unlike most of the other subsections of Section 401 of the 1940 Act, the desertion clause (subsection (g)) is expressly worded so that the act of expatriation does *not* have to occur abroad; and desertion-to-the-enemy within the United States was so improbable, in 1940 when the statute was adopted, that it cannot be thought to be Congress's only (or main) concern.

In sum, even on the bare face of Section 401—without resort to antecedent or direct legislative history—it is plain that all wartime military desertions are covered, and not merely desertions-to-the-enemy.

4. The history of Section 401 (g), both its historical background and its immediate history, provides the final and conclusive answer to Trop's contention. First, it seems clear that the progenitor of the subsection, the 1865 Act, was adopted in March 1865 not primarily to deal with desertions to the enemy, which could not have been numerous at that late stage of the Civil War (six weeks before Lee's surrender),[19] but rather to cover the many desertions to Canada, Mexico, or just back home, by the soldiers of the victorious Union army. See *Gotcheus* v. *Matheson*, 58 Barb. 152, 155–156. Secondly, it is indisputable that, from 1865 to 1912, the 1865 Act applied to peacetime desertions and thus applied at a time when desertion to the enemy would have been impossible: "thousands" of soldiers were affected by the statute during that

[19] The Act of March 3, 1865, came a month after Sherman's march northward from Savannah, and at a time when the Confederate army had dropped to around 200,000 men, largely due to desertions. The Union army numbered just over a million at the time. See 22 Ency. Brit. (1948), p. 810.

long period. *Supra*, pp. 15–17. The Act was amended in 1912 to apply only to wartime desertions, but there was not the slightest indication that it was also to be modified to apply only to desertions-to-the-enemy; and during World War I, it was not so construed. *Supra*, pp. 9, 10, 15–17. As the direct descendant of the 1865 Act (as modified in 1912), Section 401 (g) of the 1940 Act could hardly have the much narrower purpose suggested by petitioner Trop.

Thirdly, the history of Section 401 of the 1940 Act, as it was originally enacted, does not even intimate that subsection (g), as it then stood, was limited to desertions to the enemy. And, as shown in our main *Trop* brief at p. 9, the history of the 1944 amendment which added the proviso to subsection (g) conclusively shows that the proviso was thought necessary to deal with the cases of the thousands of men who had simply deserted the forces—but not to the enemy—and had then been rehabilitated. The entire emphasis was on the men who deserted from camps or units in this country, or in overseas places of training and preparation like Great Britain; contact with the enemy was not considered of any significance. The statute was viewed in exactly the same way as the predecessor 1865 and 1912 Acts had been. See H. Rep. No. 302, 78th Cong., 1st Sess.; S. Rep. No. 382, 78th Cong., 1st Sess.; 89 Cong. Rec. 3239–3245, 7107–7108, 10134–5, 10974–10976; 90 Cong. Rec. 123, 129.

D. In his Supplemental Brief on Reargument, petitioner Trop advances the new contention that Section 401 (g) is inapplicable to his case because it has not been shown that he was dishonorably discharged from

the Army "as the result of" his conviction for desertion. He points out that his sentence was a gross one imposed on the three offenses for which he was convicted—escape; absence without leave; and desertion—and argues that for this reason it cannot be said to have been imposed "as the result of" his conviction for the offense of desertion.[20]

The short answer is furnished by the holdings of this Court, at its last Term, in *Jackson* v. *Taylor*, 353 U. S. 569, and *Fowler* v. *Wilkinson*, 353 U. S. 583, that in military law only the entry of a single gross sentence for all offenses is permitted; sentences broken down as to offenses are prohibited. In a case like this where the sentence is less than the maximum for each offense, the single gross sentence necessarily covers each and all of the convictions. 353 U. S. at 574, 578–9. In civil law, a general sentence on more than one count (a practice which is not required but merely permitted) applies as to any count which is good. *Pinkerton* v. *United States*, 328 U. S. 640, 641–2, fn. 1; *Claassen* v. *United States*, 142 U. S. 140, 146–7. There is all the more reason for accepting this rule in the military system where such gross sentences are required. On review within the military system—described in the *Jackson* and *Fowler* opinions—bad or invalid counts can be set aside and sentences reduced or mitigated.

In Trop's case, the sentence was required to include a dishonorable discharge because, in 1944, the con-

[20] It is to be noted that Section 401 (g) does not require the dishonorable discharge to be imposed *solely* as the result of a desertion conviction.

trolling Manual for Courts-Martial, 1928, required any sentence of confinement for more than six months to include a dishonorable discharge (though it might, of course, be suspended). MCM, 1928, par. 104, p. 96. On review, none of the three counts—and certainly not the desertion count, which was the most serious one—was set aside, and the full sentence, far from being mitigated, was approved "although inadequate" "in order that the accused will not entirely escape punishment" (R. 9). It must therefore be assumed that the full sentence, including the dishonorable discharge which was later executed, applies to each count, including the desertion count.[21]

If petitioner were correct in his argument, Section 401 (g) could never apply to a serviceman convicted of other offenses along with desertion and necessarily

[21] Moreover, it is wholly unrealistic to speculate, as petitioner does, that his dishonorable discharge may have been imposed because of the escapes or the absence-without-leave, and not for his desertion. Desertion is the most serious of the three crimes, and in addition the chronological sequence of petitioner's offenses shows that his desertion could not have been as technical or insignificant as he now alleges. He was convicted of some offense by general court-martial in North Africa in 1944 and confined in the NATOUSA Disciplinary Training Center (R. 8). He was then transferred to the stockade, 50th Station Hospital, and escaped from there on May 9, 1944 (R. 8). He remained absent without leave on that day (R. 9). On May 22, 1944, he escaped again (R. 8), and it was his absence after this second escape which was charged as, and found to be, desertion (R. 9). At that time his organization was in Italy, apparently in combat (R. 4).

Desertion in wartime is always a serious offense "visited with especial severity" (see Winthrop, *Military Law and Precedents*, 2d ed., p. 645), and a desertion in petitioner's circumstances—after two escapes and a prior absence-without-leave, and with the soldier's unit having gone into a combat area—would cer-

given a gross sentence (including a dishonorable discharge). In such a case the contention could always be made, as it is here, that "it cannot fairly be said" that the sentence of dishonorable discharge was the "result" of the desertion conviction rather than of the other convictions. Section 401 (g) could then apply, in petitioner's view, only to cases where the soldier was tried for desertion alone or separately. But in view of the common and praiseworthy practice of trying related offenses together in the military system, it cannot be supposed that Congress intended Section 401 (g) to apply only to the unusual instance in which desertion happened to be the only offense tried by the court-martial. Rather, Congress desired the provision for loss of nationality to apply in every case where (*a*) the soldier is convicted of wartime desertion, (*b*) he is sentenced to a dishonorable discharge on that conviction, (*c*) the conviction is upheld on review and the sentence is not mitigated but is ultimately executed, and (*d*) the conditions of the proviso of Section 401 (g) are not fulfilled. Trop meets all of these requirements.

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tainly not be regarded lightly. By Exec. Order No. 9048, Feb. 3, 1942, 7 F. R. 775, the President had lifted the maximum limits on punishment for desertion (and related offenses) so that death could thereafter be imposed; and War Dept. Circular No. 273, Sec. VI, of 1942, had called this consequence—as well as the loss of citizenship for desertion—to the attention of the army, and had directed all unit commanders to explain to their soldiers the nature of these offenses and to "emphasize the serious consequences which may result from their violation". See Compilation of War Department General Orders, Bulletins and Circulars, Jan. 1, 1943 (G. P. O.), p. 343.

IV. ADDITIONAL DISCUSSION OF CONSCRIPTION AS PROVING DURESS [22]

In our main brief in *Nishikawa*, No. 19, we urged, among other points, that (*a*) mere proof of conscription into a foreign army was not in itself sufficient to establish a *prima facie* defense of duress, (b) on the facts found by the two courts below, conscription into the Japanese army was all that Nishikawa proved, and (*c*) the courts below did not err in holding that this proof was inadequate to avoid Nishikawa's loss of nationality. In this supplemental brief, we add some further comments on the role of conscription in determining the issue of duress.

A. We emphasize again that in *Acheson* v. *Murata*, 342 U. S. 900, and *Acheson* v. *Okimura*, 342 U. S. 899, this Court has already determined that proof of conscription into the foreign army is not enough to show duress. In each of those cases, the trial court had found, and it was undisputed, that the plaintiff had been conscripted into the Japanese army. Nevertheless, the Court remanded the cases for findings as to the circumstances surrounding the appellees' military service "and the reasonable inferences to be drawn therefrom". If conscription were enough, the judgments would have been affirmed without more; there would have been no need for further findings or for a remand.[23]

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[22] This point is pertinent only to the *Nishikawa* case, No. 19.

[23] The dissenters in *Mandoli* v. *Acheson*, 344 U. S. 133, 139-140, also held that conscription, in and of itself, was not enough to show duress. The majority had no occasion to consider that issue.

B. The reported appellate cases on loss of nationality through foreign service, which are closest to *Nishikawa* on their facts, hold that the service was voluntary and not under duress. In this connection, we should also like to point out the factors additional to those present in this case which existed in the appellate cases in which the foreign military service was held to be involuntary.

1. In *Zimmer* v. *Acheson*, 191 F. 2d 209 (C. A. 10), Harry Ward Zimmer, a dual-national then living in Germany, was drafted, in 1940, into the German army; he made no report to the American consul and no effort to prevent his induction, except that he did tell the German draft board that he was an American and the board told him to "stay in line". "He testified that he was fearful harm would come to him or his wife; that they talked it over and decided that the war would not last very long and that perhaps the best thing to do would be to enter the army." 191 F. 2d at 210. The trial court held that his service was voluntary and the Tenth Circuit affirmed. 191 F. 2d at 212. As shown in our main brief, pp. 3–8, 45–48, Nishikawa's case is certainly no stronger than Zimmer's, and probably less strong since petitioner did not even inform the draft authorities that he was an American. The *Zimmer* case is directly in point.

Likewise in point is *Coumas* v. *Brownell*, 222 F. 2d 331 (C. A. 9), in which Coumas was held to have expatriated himself by taking the oath of allegiance when he was inducted into the Greek army in 1932. The court said: "It nowhere appears that he protested his induction, and he voluntarily went to Greece

[in 1932] presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army." 222 F. 2d at 332. The close resemblance to petitioner's case is plain.

2. In determining whether duress was present or not, each particular case must, of course, stand and be judged on its own complex of facts, factors, and circumstances. But it seems worthwhile to point out that, in the appellate cases in which duress was found, there was always some significant factor bearing on duress in addition to the elements present in Nishikawa's case.

In *Dos Reis* v. *Nicolls*, 161 F. 2d 860 (C. A. 1), the claimant, on receiving his Portuguese draft notice, made inquiries at the American consulate and was told to return to this country if he did not wish to serve; he told the Portuguese military authorities that he was an American citizen and did not ask to serve in the Portuguese army; he was told that the only alternative to service was a concentration camp; as soon as released from the Portuguese army, he returned to this country as a stowaway. 161 F. 2d at 861. The trial court recognized his service as involuntary, but held against him on other grounds. 161 F. 2d at 862. In *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2), Podea had applied to the American consulate for a passport, so that he could return to the United States and avoid drafted service in the Roumanian army, but he was erroneously refused the passport on the ground that he had already lost his nationality through his father's registration as a Roumanian; shortly before he was inducted, he again

applied for an American passport and was again erroneously refused; he was then conscripted and, as an incident thereof, took an oath of allegiance to Roumania; after release from service he made another unsuccessful effort to return to this country as an American and on a temporary visit here on a Roumanian passport was officially told to return and to try to enter as a permanent alien-immigrant; on his return to Roumania, he was again inducted into the army in 1941. In *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2), Pandolfo told the Italian officer in charge of induction that he was an American and should not be obligated to serve in the Italian army; he had very limited schooling and lived at a distance from the nearest American consulate. 202 F. 2d 40.[24]

In *Acheson* v. *Maenza*, 202 F. 2d 453 (C. A. D. C.), the American consulate had erroneously refused Maenza a passport to return here, and the trial court believed his testimony "that he objected vigorously when he was originally conscripted, to the point of seeking to enlist the aid of American authorities and to the extent that force had to be used to remove him to his training camp". 202 F. 2d at 455, 458–9. In *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3), Lehmann visited the American consulate before his induction, and asked whether "there would be any way of getting to the United States, because I wanted to join the Air Force at that time", but was told that he could be given no

[24] It should be noted that the Second Circuit expressly stated that, if the trial court had found Pandolfo's service to have been voluntary, "we would not have reversed such finding as clearly erroneous." 202 F. 2d at 41, fn. 6.

assistance; he was also told that the Consulate could not help him to avoid service in the Swiss Army. 206 F. 2d at 595. In *Augello* v. *Dulles*, 220 F. 2d 344 (C. A. 2), involving the taking of an oath of allegiance as a conscript in Fascist Italy in 1936 or 1937, there was grave doubt that the plaintiff had taken the oath of allegiance in 1937 when he was of age; and it was significant that after living for many years in Italy he had been conscripted when he was only 20. See also our main brief in *Nishikawa*, at pp. 29-31, for a discussion of *Augello* and the Attorney General's opinion in the *Panzica* case, 41 Op. Atty. Gen. No. 16, on which *Augello* rests.[24]

In *Alata* v. *Dulles*, 221 F. 2d 52 (C. A. D. C.), Alata registered at the American consulate in 1928 and came again in 1929; prior to his induction into the Italian army in 1933, he was not informed by the Consulate that he should protest induction but was told that it was always possible to return to this country after his Italian military service. 221 F. 2d at 54–55. In *Soccodato* v. *Dulles*, 226 F. 2d 243

[24] *Perri* v. *Dulles*, 206 F. 2d 586, 589 (C. A. 3), concerned a man who was already serving in the Italian army (as a conscript) when Section 401 (c) became effective on January 13, 1941. The court held that his continued service was *prima facie* involuntary, "subject to rebuttal by evidence that on or after that date Italian law or military practice would have permitted the plaintiff to secure release, on the ground of his United States citizenship or otherwise". See also 230 F. 2d 259.

[25] *Monaco* v. *Dulles*, 210 F. 2d 760 (C. A. 2), does not involve duress at all, but only the proof of performance of the expatriating act itself: the court held that there was insufficient proof that Monaco had taken the Italian oath of allegiance asserted by the Government as the expatriating act.

(C. A. D. C.), the plaintiff's original taking of the oath of allegiance, in 1935, was while he was still a minor; admittedly, it did not expatriate him; he was recalled to service in 1940 (but did not take a new oath) and remained a soldier until 1946. But he became a prisoner of war early in February 1941, only a few weeks after Section 401 (c) became effective, and did not obtain release until March 1946. The court held that his "period of actual military service after the 1940 Act became effective was only a few weeks in 1941 and a few days in 1946. His failure in these two short intervals to seek release from the army did not cause a loss of citizenship." 226 F. 2d at 244–5.[27] *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3), involved Section 401 (d), providing for expatriation by taking employment under a foreign state; economic duress was shown in testimony that he had to take the job in order to earn a livelihood—"dire economic plight and inability to obtain employment". 233 F. 2d at 554, 556.

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[27] *De Marco* v. *Dulles*, 226 F. 2d 265 (C. A. D. C.), *Becce* v. *Dulles*, 226 F. 2d 265 (C. A. D. C.), and *Santi* v. *Dulles*, 226 F. 2d 266 (C. A. D. C.), were remanded on the authority of *Soccodato*. Similarly, *Bruni* v. *Dulles*, 235 F. 2d 855 (C. A. D. C.), made no definite finding on duress but remanded for consideration by the trial court under the criteria stated by the appellate court.

CONCLUSION

For the foregoing reasons, and those set forth in our main briefs in these cases, it is respectfully submitted that the judgments below should all be affirmed.

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SEPTEMBER 1957.